

NATIONAL MINORITIES AND THE LAW OF THE EUROPEAN UNION

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I. Introduction

1. The Main Issues Discussed

Europe consists not only of the Member States and the state-forming nations; the cultural diversity of the continent includes national minorities, as well.¹ It is common knowledge that several pieces of traditional public international law have sought to influence the conditions of national minorities. Particularly important are the often-invoked agreements, recommendations, resolutions adopted under the aegis of the Council of Europe. However, our current examination focuses on the law of the European Union. This subject matter is particularly apt for highlighting the fact that the scope of the once economic integration has expanded beyond the area of international economic relations, and that the law of the Union will necessarily have to face the complex issues of the life and possible protection of national minorities.

This paper first dwells on four general questions: What is the traditional position of the law of the Union vis-à-vis minority rights? What are the reasons behind this particular attitude? What are the possibilities of the protection of national minorities under the existing law of the Union? Further, why would it be worth going beyond this level? This is then followed by the review of certain issues important from a Hungarian perspective, namely: the so called Status Act and the initiative of awarding Hungarian citizenship without Hungarian residence leading to the subsequent modification of the Act on Citizenship.

2. Decades of Silence

The answer to the first question on the traditional position of the law of the Union or the European Community was rather simple for a long time. The Community and later the Union was silent on the issue for several decades. Originally, the EC Treaty establishing the European Community in 1957 dealt only with citizens and the prohibition of discrimination on grounds of nationa-

¹ "Diversity in the European Union goes much beyond diversity along national lines." Nick BERNARD, op. cit., p. 211. See also Árpád GORDOS, "L'Intégration européenne et la sauvegarde des valeurs culturelles." In: Francis Delpérée et al., *L'unité et la diversité de l'Europe – Les droits des minorités. Les exemples belge et hongrois*. Brussels: Bruylant, 2003 (proceedings of the international colloquium held at the Palais d'Egmont on 28 October, 2002).

lity.² It did not arise that citizens might belong to various communities, thus national minorities, and might have personal or group interests worthy of appreciation and protection. At least, this was not believed to have any significance in terms of integration based on economic freedoms.³ For decades, Community law did not touch the rights of national minorities, nor was, apparently, the European Court of Justice in any great bustle to deliberate the complicated means of protecting them. Its jurisprudence on language rights has been a telling sign of its incomprehension.⁴

II. The Reasons behind Piecemeal Regulation

1. Economic Integration

In excuse of the European Community and the Union, we may say that the founding fathers had created an economic integration that did not go beyond abolishing customs duties and ensuring the free movement of workers and the freedom of competition. This however will not do as a full or a more than temporary justification, because it had been all too clear for the founding fathers themselves that economic integration would only be a first step towards an expressly political goal, the *finalité politique*: a unified Europe.

Arguably, the situation and the rights of national minorities remained an internal matter also because of being brushed aside emotionally, politically and legally by some of the Member States. In the meantime, however, these issues, from Catalonia through Corsica to Southern Tyrol, were given noteworthy treatment, even exemplary solutions providing wide-ranging regional autonomy. And, as far as personal and cultural autonomy is concerned, the Lapps of Scandinavia, Italians and Hungarians of Slovenia or the Danes of Germany could be brought up as examples.⁵ Nevertheless, this has been a rather uneven

² See Article 12 (formerly 6) of the EC Treaty.

³ For an essentially similar view, see Giuliano AMATO and Judy BATT, “Minority Rights and EU Enlargement to the East. Report of the First Meeting of the Reflection Group on the Long-Term Implications of EU Enlargement: the Nature of the New Border.” European University Institute, RSC Policy Papers Series, No 98/5, 1998, 29 pp.: “The Community was established in 1957 as a framework for promoting economic cooperation and integration, whose underlying political purpose was to secure peace and prosperity in Europe, above all by binding Germany into an enduring partnership with its western neighbours. It was conceived as a Community of states based on shared, and institutionally entrenched liberal-democratic principles. But there was no reference to a common ‘European’ culture, underpinning the Community, beyond attachment to these broad principles.”

⁴ See e.g. case C-274/96, Criminal proceedings against Horst Otto Bickel and Ulrich Franz, *ECR* (1998), p. I-7637.

⁵ See “A területi, személyi autonómia és a kettős állampolgárság gyakorlatáról az Európai Unióban.” [On the Practice of Territorial, Personal Autonomy and Dual Citizenship in the European Union], Budapest: Magyar Országgyűlés Külügyi Hivatal [Foreign Office of the Hungarian Parliament], manuscript, April, 2005.

progress. France, for instance, has continued to have reservations about widening the means of protecting national minorities. Consequently, it has not ratified the European Charter for Regional and Minority Languages adopted under the aegis of the Council of Europe,⁶ and did not as much as sign the Framework Convention for the Protection of National Minorities.⁷

2. The Position of International Law

The silence was surely also corroborated by public international law after the World War II, which held that the rights of the various minorities should and could be ensured through the international regime of universal human rights.⁸ It is to this universalism that the lack of sensibility for particularisms on the part of European integration can be traced back to, especially if those embodied some sort of national concept.⁹ Furthermore, it is also a fact that Community law did not deal with the issues of general human rights in the first decade of its existence; however, by the end of the 1960s, it became abundantly clear that the former position could no longer be maintained: European integration was bound to spill over the bounds of economic relations, could and would affect the human person, his or her social embeddedness, even culture, traditions and language.

Following this recognition, protection of general human rights ran a distinguished career in recent decades, at the end of which the catalogue of the fundamental human rights found its way into EU law. Further, a special European organisation, the so-called Agency for Fundamental Rights (FRA) was set up to analyse its implementation.¹⁰ In comparison, the protection of minorities in the Union has remained incomplete and piecemeal in spite of the fact that mainstream theory includes this among human rights.¹¹ What is more, international

⁶ See European Treaty Series No. 148. It has been in force in Hungary since 1 March, 1998, see its official publication in *Magyar Közlöny* [Hungarian Official Journal], 1999, no. 34. For further details on ratification see the site of the Council of Europe: <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=148&CM=8&DF=7/22/2006&CL=ENG>

⁷ See European Treaty Series No. 157. For its official Hungarian publication, see *Magyar Közlöny* [Hungarian Official Journal], 1999, no. 27.

⁸ János BRUHÁCS, *Nemzetközi Jog II. Különös rész* [International Law II: Particular Part]. Budapest-Pécs: Dialóg Campus Kiadó, 1999, p. 178.

⁹ See George (György) SCHÖPFLIN's lecture "Konzervativizmus és nemzet" (Conservatism and Nation) delivered at the symposium on Modern Conservatism in Budapest on 29 November, 2003.

¹⁰ See Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights. *OJ L* 53, 22.2.2007, pp. 1-14. It is to be hoped that the FRA will be able to ensure the acceptance of the broad interpretation of Article 6 of the Treaty on European Union, i.e. the respect for human rights includes the protection of and respect for minorities, as well.

¹¹ Frank HOFFMEISTER, "Monitoring Minority Rights in the Enlarged European Union." In: Gabriel N. Toggenburg, *Minority Protection and the enlarged European Union: The way*

law has come to recognising the good reasons for protecting minority rights, particularly in view of the political and social stability of the states concerned as the Declaration of the UN General Assembly states.¹² It is also worth referring to a recent development, Resolution 1334 of the Parliamentary Assembly of the Council of Europe on positive experiences of autonomous regions as a source of inspiration for conflict resolution in Europe, which clearly states that minority rights are guarantees of preserving cultural identity, and that the principle of the indivisibility of states is compatible with autonomy, regionalism and federalism.¹³ The same Assembly adopted other, similarly significant instruments: Recommendation 1623 on the rights of national minorities in 2003 and Recommendation 1735 on the concept of “nation” in 2006. The latter document emphasises a direction of development as a result of which minority rights are acknowledged not only in respect of natural persons, but also cultural and national communities.¹⁴

The Union has no reason to keep quiet any longer, unless the reluctance of one or two Member States comes to be regarded as sufficient excuse. Moreover, resolving this problem would be important from the point of view of the future of integration, too. This would however require a re-thinking of EU law, a review of even the generally used legal terminology all the more so because it often speaks only of the respect for the national identities of the Member States.¹⁵ In addition, in its current state, EU law uses “Member State” and “national” as synonyms and mentions “national rights”, “national courts” as though implicitly assuming homogeneous nation states, or that a nation is the legal community of the citizens living in a given country, with no consideration for cultural, historical and ethnic relations or the diversity often manifest within a single Member State. However, it is promising, that the new Article 4 of the TEU, codified by the Lisbon Treaty, refers to national identities of the Member States “inherent in their fundamental structures, political and constitutional, inclusive regional and self-government” abandoning the underlying concept of unitary states.

forward. Budapest: Open Society Institute: Local Government and Public Reform Initiative, 2004., pp. 85-106 and 88 in particular.

¹² See UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities; see also János BRUHÁCS, op. cit., p. 181.

¹³ See especially points 10 and 12 of the Resolution.

¹⁴ For a collection of the international legal norms concerned, see Katalin BALÁZS and Bálint ÓDOR (eds.), *A nemzeti és etnikai kisebbségi jogok nemzetközi forrásai* [The International Sources of National and Ethnic Minority Rights]. Budapest: Magyar Országgyűlés, 2006, 922 pp. (in Hungarian, English and French).

¹⁵ A classical example was Article 6 (3) TEU – before the amendments of the Treaty of Lisbon: “The Union shall respect the national identities of its Member States.”

III. The Possibilities and Means of Protecting National Minorities under the Current Law of the Union

1. The Single Market and Hungarians

Before discussing the European legal means of protecting national minorities, it is first worth reviewing the effects of accession to the Union on national minorities. First and foremost, members of a given minority will also be able to make use of the advantages of the *single market* or internal market of Europe. In other words, they can leave the country of their citizenship, take up employment, set up business, establish themselves, provide and receive services, and invest capital in any of Member States of the Union.¹⁶

As Hungary has been a member of the European Union since 2004, the accession of neighbouring countries has afforded a unique opportunity for strengthening the organic economic, social and cultural relations between Hungary and cross-border Hungarians, the rights provided in the name of establishing the single market being natural supports of Hungarian-Hungarian connections. The vanishing of the economic significance of the borders between the Member States of the Union may lead to the revitalisation of the *regions* and *regional centres* of historical Hungary. Accordingly, Sopron, Pozsony [Bratislava] and Kassa [Kosice] may acquire an increasing role in regional development.¹⁷ Similar processes can unfold and gain strength with Romania's accession in the regions concerned. It must be noted, however, that this is but an opportunity. For it to materialise, a conscious economic policy is needed in Hungary, thinking in terms of the whole Carpathian Basin, a *co-ordinated national policy that takes the initiative and looks ahead for several decades*. If this opportunity is not seized on, the *centrifugal forces* of the single market may take the field, and Hungarians living outside the borders of Hungary will seek employment and prosperity in Western Europe. In other words, the opportunities the single market offers can contribute to the migration of minorities, their dispersal in the long run.

It must also be noted that Hungary's accession has been detrimental – hopefully only temporarily – to the Hungarians of Sub-Carpathia in the Ukraine and of Vojvodina in Serbia. An example of this is the regulation of cross-border relations: pursuant to its obligations undertaken during the accession negotia-

¹⁶ Articles 39-60 of the EC Treaty, now Articles 45-46 of the Treaty on the Functioning of the European Union (TFEU).

¹⁷ Géza ENTZ discusses this possibility in respect of the geographical relation between the counties Gömör and Nográd and the central areas of Ipoly shared between Slovakia and Hungary. See his "A határon túli magyarság és a magyar támogatási politika feladatai" [Cross-border Hungarians and the Tasks of Hungarian Support Policy]. In: *Magyar Szemle*, 2004, nos. 11-12, pp. 14-16.

tions, Hungary has terminated all the cross-border agreements that do not meet Union requirements. There is therefore no cross-border system operating in respect of the Ukraine and Serbia, which would assist the relations between people living in the border regions, facilitate cross-border economic, social and cultural ties. It is a fundamental Hungarian interest that Union-level regulation be adopted on cross-border traffic.¹⁸

2. Union Citizenship and the Hungarian Minority

Persons holding the nationality of the Member States of the European Union are at once citizens of the Union. This will no doubt strengthen the status of Hungarians living beyond Hungarian borders. Apart from the freedoms mostly economic in nature mentioned in the foregoing (e.g. the right of residence), Union citizenship implies further rights. For example, every citizen of the Union has the right to *petition* the European Parliament, or apply to the European Ombudsman. Furthermore, she or he has the right to write to any of the institutions and certain bodies of the European Union in one of the *authentic languages* of the EU, in this case Hungarian, and have an answer in the same language.¹⁹

Generally speaking, it may easily occur in Central and Eastern Europe that, since linguistic, national and state borders do not correspond, an authentic language of the Union is not only the official language of one of the Member States, but also that of national minorities living in neighbouring states – as mentioned in the chapter on language above. Thus Hungarian as an official language can strengthen the standing of the Hungarian minority living in neighbouring Slovakia, helping it obtain information on matters of European integration, while it can provide a situational advantage to Hungarians in Serbia and the Ukraine in seeking information on the Union. The European Union can thus help Hungarian language be delivered from its disadvantaged situation in these areas of former Hungary.²⁰

¹⁸ For a detailed discussion of the issue, Bálint ÓDOR, *Lehetőségek a magyar-magyar kapcsolattartás bővítésére* [Possibilities of Expanding Hungarian-Hungarian Relations]. Budapest: manuscript, December, 2004. For the Community earlier draft legislation, see COM (2003) 502-1, 2. The issue was finally settled by Regulation of the European Parliament and of the Council 1931/2006/EC laying down rules on local border traffic at the external land borders of the Member States and amending provisions of the Schengen Convention. *OJ L 405*, 30. 12. 2006, pp. 1-22.

¹⁹ See Article 17-22, 314, as well as 7 of the EC Treaty, now Articles 20-25 TFEU and Articles 13, 55 of the Treaty on European Union (TEU).

²⁰ It should be noted however that the language policy of the European Union has several shortcomings, as well. As the Bolzano Declaration on the Protection of Minorities in an Enlarged European Union (1 May, 2004) has also emphasised: “the EU Lingua program is a good example: while it aims to foster less widely-taught languages, it excludes regional and minority lan-

3. Prohibition of Discrimination on Grounds of Ethnic Origin or Belonging to a National Minority

As noted already, the protection of national minorities was not an explicit aim of the European Community and Union, in accordance with mainstream international law after World War II. In the last decade, as the scope of the Union has widened, favourable tendencies were also manifest in the development of European law. So, the Treaty of Amsterdam, which amended the Treaty establishing the European Community on several points, and which came into force in 1999, provided the basis for legislation on combating discrimination on grounds of *ethnic origin*.²¹ Based on this authorisation, the Council of the European Union soon adopted Directive 2000/43/EC²² prohibiting racial or ethnic discrimination. Now, this law is about the principle of equal treatment, the prohibition of discrimination,²³ proscribing any, either direct or indirect discrimination on grounds of racial or ethnic origin. At the same time, with a view to ensuring full equality, the directive definitely supports so-called specific measures, the adoption of “positive actions” and the provision of specific assistance to prevent or compensate for disadvantages linked to racial or ethnic origin.²⁴ This authorisation had a significant part to play in proving that the Hungarian Status Act would not contradict the law of the European Union. Nevertheless, the possibility of positive discrimination still does not mean the recognition of the rights of a national minority as a characteristic group in need of protection, even less does it enumerate or codify these rights. The directive provides merely for the possibility of supporting national minorities at member-state level.

guages. Another example, the current action plan on language learning and linguistic diversity, addresses regional and minority languages but fails to earmark specific funds for such fields – a fact that seriously dilutes the minority component of the EU’s language policy” (p. 10).

²¹ Thus Article 13 of the EC Treaty included: “Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.” Now it is replaced, in substance, by Article 19 TFEU.

²² Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. *OJ L 180*, 19.7.2000, pp. 22-26.

²³ See Article 2 of the Directive: “1. For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin. 2. For the purposes of paragraph 1 (a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin; (b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.”

²⁴ See Article 5 of the Directive.

As compared to this directive, Article 21 of the Charter on the Fundamental Rights of the European Union lays down a far more unequivocal rule in so far as it prohibits discrimination on grounds of not only ethnic origin, but also *membership of a national minority*.²⁵ It is nonetheless an undeniable defect of the Charter that it did not enact the rights of national minorities – in spite of the fact that several non-governmental organisations had initiated it at the time of its preparation.²⁶ It should also be noted that the European Court has not yet interpreted the provisions mentioned. To date, its jurisprudence related to national minorities has only addressed issues of language, indeed reflecting an earlier situation where Community law mostly focused on the prohibition of discrimination on grounds of nationality, and thus attempting to interpret the language rights of national minorities exclusively in this system of co-ordinates. In the Bickel and Franz case, however, it did acknowledge, at least in theory, the protection of ethnical and cultural minorities as a legitimate aim of national policies, although it did not find its invocation well-founded in the particular instance.²⁷

4. The Protection of the Values on which the Union is Based

Article 2 of the Treaty on European Union declares: “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.”²⁸ Particularly important is the fact that the Treaty on European Union provides means for the Union to ensure that all Member States respect these values. Should a Member State persistently and seriously breach these principles, some of its rights in respect of the Union may be even suspended. The significance of this provision lies in the fact that the protection of fundamental values is not confined to the areas the law of the Union regulates because it would be absurd for the Union to tolerate the infringement of human rights and the rule of law in areas falling within the scope of the Member States.²⁹ It is also obvious, however, that the protection of fundamental principles is meant not to serve the purposes of redressing personal injuries, but to be

²⁵ *Bulletin of the European Union*, 12/2000, p. 171 and for the amended text see *OJ C* 83, 30.3.2010, pp 389-403.

²⁶ Bruno de WITTE, “The Constitutional Resources for an EU Minority Policy.” In: Gabriel N. Toggenburg (ed.), op. cit., pp. 107-124, especially 110.

²⁷ “Of course the protection of such a minority may constitute a legitimate aim.” See point 29 of Case C-274/96, Criminal proceedings against Horst Otto Bickel and Ulrich Franz, *ECR* (1998), p. I-7637.

²⁸ Text adopted by the Lisbon Treaty.

²⁹ Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union. Respect for and promotion of the values on which the Union is based. Brussels, 15. 10. 2003, COM (2003) 606 final, p. 5.

applied when serious shortcomings characterise the political system and the operation of a Member State.³⁰ If, however, the rights of a national minority as a community were seriously injured, Articles 6 and 7 of the Treaty on European Union could justly be invoked.

5. Past Injuries of the Hungarian Minority and the Law of the Union

It is common knowledge that the Hungarian minority living in neighbouring countries suffered serious injustices both as a community and at individual level in the wake of World War II, the consequences of which – being deprived of citizenship for instance – are borne by many to this day. A typical example of these unlawful and unjust measures was the Beneš Decrees. During the political transformation, the return to the legal community of European states, but especially during the run-up to the accession to the European Union, it seemed quite justified to raise the issue what possibilities of redress the law of the Union would provide for past injuries. Though the European Court of Justice has not made any ruling on this, the consensus among lawyers is that the answer would likely be negative.

First, it should be mentioned that the question was brought up with particular emphasis in respect of the deprivation of citizenship of the Sudeten Germans before the Czech accession. In looking for the answer, the European Parliament sought the expert opinion of three outstanding jurists, and their conclusion was that the Treaty establishing the European Union could not be applied to injuries suffered before accession.³¹ In consequence, the European Parliament agreed to the accession of the Czech Republic to the European Union in spite of the fact that the Beneš Decrees were formally still in effect though not applied. Indirectly, this negative answer was also corroborated by the rulings of the European Court of Human Rights, which, essentially on grounds of the passage of time (*ratione temporis*), rejected the application of the European Convention on Human Rights. It thus declared with regard to the confiscations and dispossessions of 1945-48 that the rules protecting property could not be applied because “the hope of recognition of the survival of an old property right which it has long been impossible to exercise effectively cannot be considered as a ‘possession’.”³²

The legal opinion summarized above is of course debatable, but there is little chance of its being changed. The rejection was underpinned by arguments both historical and political. After World War II, the victorious powers conferring at

³⁰ Frank HOFFMEISTER, op. cit., p. 100, and Bruno de WITTE, op. cit. p. 114.

³¹ Legal opinion on the Beneš-Decrees and the Accession of the Czech Republic to the European Union. Prepared by Prof. Dr. Dres. H. C. Jochen A. Frowein, Prof. Dr. Ulf Bernitz, the Rt. Hon. Lord Kingsland Q. C., 10-2002.

³² Prince Hans-Adam II of Lichtenstein v. Germany, Judgement of 12 July, 2001. Reports of Judgements and Decisions 2001-VIII, application no. 42527/98.

Potsdam in 1945 had themselves adopted resolutions that provided for the partial or full resettlement of the German minority in Poland, Czechoslovakia and Hungary to Germany, reckoning with all the legal consequences. Though the Czech diplomacy could not achieve the same result with regards to the Hungarian minority, the regulations concerning the German minority nevertheless did provide a legitimacy of sorts to the measures taken against the Hungarians in Czechoslovakia and the deprivations of civil rights in general.³³ Put in another way, the subsequent redress of the injuries of the rights of national minorities invoking European law would – at least indirectly and partially – cast doubt in the eyes of many on the very peace framing that ended the Second World War. Nevertheless, that the issue is far from closed is witnessed to by the fact that the Czech president delayed the ratification of the Lisbon Treaty in the autumn of 2009 stating that should it make the Charter of Fundamental Rights of the European Union be a binding source of law, it would open the way to contesting the legality of the measures based on the Beneš Decrees and claiming damages for them.

6. Getting Rid of the Double Standard of the European Union

In view of the foregoing, it is mostly in the future that the law of the Union might have a role in protecting national minorities. In order to do so, however, it will have to get rid of its double standard. The point here is that the institutions of the EU, in accordance with the Copenhagen criteria of accession, seriously, even increasingly examine the conditions of national minorities in candidate states.³⁴ There is however an obvious tendency to regard it a matter of internal policy in the case of Member States. In contrast, there have been several studies and calls urging the European Union to formulate its own policy vis-à-vis national minorities³⁵ – and not only in the framework of common foreign policy and accession criteria, but also internally, in respect of the Member States themselves. This desirable development would be supported by the minority-protection conventions and instruments concluded under the aegis of the Council of Europe, which demonstrate that tendencies in the other “integration” organisation of Europe have changed to the better for national minorities.³⁶

³³ For a detailed discussion of the issues of Beneš Decrees, see Gábor KARDOS, *Beneš dekrétumai és az Emberi Jogok Európai Egyezménye* [The Decrees of Beneš and the European Convention on Human Rights]. Budapest: manuscript, 2004.

³⁴ Frank HOFFMEISTER, op. cit., p. 87. For recent developments, for instance the position the Union took at the Croatian accession negotiations, see Árpád GORDOS, “EU Enlargement and EU Neighbourhood Policy as Instruments for Promoting Stability.” In: *Central European Political Science Review*, Summer 2005, no. 20, pp. 22-33, especially 28.

³⁵ See Giuliano AMATO and Judy BATT, op. cit., p. 4; as well as the Bolzano Declaration, op. cit., p. 6, and Bruno de WITTE, op. cit. 2, p. 109.

³⁶ The following sources should be noted in this respect: Framework Convention for the Protection of National Minorities (1994) European Treaty Series No. 157. Officially published in

IV. Why would a More Comprehensive Regulation of the Rights of National Minorities be Important for the Union?

1. Some Characteristics of Central and Eastern Europe

The comprehensive regulation of the rights of national minorities is desirable partly because the law of the Union is lagging behind in respect of both the laws of the Member States and international law. This asynchronism, this lack of congruence, is rather unfortunate because the law of the Union, which has a supremacy and often direct effect, can seriously obstruct the exercise of rights in Member States. On the other hand, the European Union admitted a new type of region. In terms of ethnicity, religion and culture, Central Europe is far more variegated and complex than Western Europe. Not even the kind of relative homogenisation that had taken place as a result of the development of the state in the countries of the Atlantic coast in the Middle Ages went along its way on the other side of the continent. Of course, no full unification was attained in Western Europe either; and cultural diversity is undergoing a revival under our very eyes.³⁷

Central and Eastern Europe however manifests other characteristics, too: as a result of a number of reasons, it experienced the formation of vast multi-ethnic, multi-language and multi-cultural empires – the Habsburg, the Turkish and the Russian ones. However rapidly these empires were dissolved or fell apart in the 20th century, nation and state still do not overlap, and the number of minorities living in the region has little decreased.³⁸ Furthermore, belonging to any of the minorities often bears direct political meanings, the espousal of a kind of programme, but sharing a common fate³⁹ certainly has a definitive role in shaping identity.

Hungarian in: *Magyar Közlöny*, 1999, no. 27; Recommendation 1492 (2000) – Rights of national minorities; as well as Resolution 1334 (2003) – Positive experiences of autonomous regions as a source of inspiration for conflict resolution in Europe.

³⁷ On “ethnic revival” in Western Europe, see Andre LIEBICH, *Ethnic Minorities and Long-Term Implications of EU Enlargement*. Florence: European University Institute, RSC Working Paper, No. 98/49, pp. 5 and 9. The effects of immigration in Western Europe in the past 50 years should neither be forgotten, resulting in multi-ethnic and multi-cultural societies as it did. Cf. Nick Bernard, BERNARD, Nick, *Multilevel Governance in the Euroean Union*. The Hague, London and New York: Kluwer Law International, 2002, 275 pp., pp. 207-208.

³⁸ See Andre LIEBICH, *op. cit.*, p. 2: “‘Discontinuity’ and ‘empire’ are two terms which provide the key to the historical situation of East Central Europe’s minorities and indeed, to the history as a whole. It is these terms too that define the most significant contrast between East and West European Development.” For a more complex approach, see Giuliano AMATO and Judy BATT, *op. cit.*, p. 4.

³⁹ For all scholarly discourses on the experience of common fate, a Transylvanian Hungarian folksong from the village of *Csíkrákos* puts it the most succinctly: “I know I never started it, I know I’ll never end it, people die and are borne, the nation has no end.”

2. Enlargement of the European Union

The acknowledgment of the rights of national minorities, their rights as communities, would be significant from the point of view of the stability of the region and the functioning of the European Union.⁴⁰ We would be justified in saying that, lacking this, the European Union was unprepared for enlargement.⁴¹ As opposed to other areas, action by the European Union in this one would have been only reasonable – to lay down that integration should primarily provide support in principle, i.e. acknowledge minority groups and their rights. To a certain extent, it did recognise this in stipulating the respect for the rights of national minorities as a condition of accession. But it did so ambiguously, formulating the criterion only in respect of candidate states, and not spelling out any such requirement for itself, the law of the Union. The application of this double standard, which we have already discoursed about, has been widely criticised by the Western literature, as well.⁴² This is how the rather out-of-date and odd situation came into being that the Peace Treaty of Trianon⁴³ and the minority-protection agreements concluded between the Entente Powers and Czechoslovakia, Romania, the Kingdom of Serbs, Croats and Slovenes included more serious provisions on protecting minorities⁴⁴ than the Treaty establishing a Constitution for Europe and its successor, the Lisbon Treaty, which has gone only as far as to interpret minority rights on the level of the individual – actually, as a result of Hungarian efforts.⁴⁵

⁴⁰ It was in recognition of this that the European Council adopted its Warsaw Declaration and Action Programme, which Recommendation 1735 of the Parliamentary Assembly of the Council of Europe already mentioned quotes: “Europe’s chequered history has shown that the protection of national minorities is essential for the maintenance of peace and the development of democratic stability. A society that considers itself pluralist must allow the identities of its minorities, which are a source of enrichment for our societies, to be preserved and to flourish.”

⁴¹ The need for the protection of national minorities is far from a novel recognition. In proof of this let me quote Tibor Eckhardt’s words published in 1930 (!): “The protection of national minorities by law cannot be omitted either; because no acceptable atmosphere can be made without it in Central Europe. The response of the Hungarian government on this can be neither hesitating nor fickle, it would in this way do a disservice not only to the Hungarian cause but also the peace of Europe.” Tibor ECKHARDT, “Az Európai Egyesült Államok. Mi legyen a magyar álláspont?” [United States of Europe. What should be the Hungarian Point of View?]. In: *Előőrs*, vol. III, no. 23, 7 June, 1930, p. 2.

⁴² See for instance Bruno de WITTE, op. cit. 2, p. 109.

⁴³ See Articles 44, 47 and 54–60 of the Peace Treaty of Trianon of 1920, ratified by Hungary in Act XXXIII of 1921.

⁴⁴ See János BRUHÁCS, op. cit., p. 176.

⁴⁵ Article I-2 of the Treaty establishing a Constitution for Europe. In its resolution 133/2003 of 17 December on the ratification of the Treaty establishing a Constitution for Europe, the Hungarian Parliament attached the following interpretation to the Article in question: “According to the Hungarian Parliament, the Article applies also to the common exercise of the rights of persons belonging national and ethnic minorities.”

It goes without saying that one must take particular care when comparing instruments of the past and the present. The Constitutional Treaty and the Lisbon Treaty came into being in quite different circumstances, in a quite different historical predicament and for quite different purposes. Moreover, the provisions on the protection of minorities of the said agreements were generally never implemented.⁴⁶ But again it should not be forgotten that an enlarged European Union now includes the very same people whose problems the settlement following the First World War had tried, in vain, to address, and who continue to struggle with the same difficulties after 80 years have passed, which, of itself, European economic integration is hardly going to undo. It was partly this recognition that led to the adoption of the Framework Convention for the Protection of National Minorities under the Council of Europe and Resolution 1334⁴⁷ of the Parliamentary Assembly of the Council of Europe mentioned earlier on. Again, the lag-behind on the part of the law of the Union is stark not only with respect of past documents, but also the instruments of international law.

Naturally, all cannot be entrusted to the care of the law of Union or international law, hoping in some sort of unified, central solution.⁴⁸ Only solutions that are worked out by the Member States and the minorities living in their territories, and which are based on local characteristics, can lead to lasting and satisfying settlement. At the same time, the mother countries of minorities also have their duties to fulfil in respect of supporting their cross-border communities. But what is needed for these countries is to be able to perform their missions in a supportive environment of international and EU law, one in which the European Union perhaps even applies efficient pressure, but certainly is responsive to and seeks to solve the predicament of national minorities in providing a flexible framework for agreements negotiated at local and state level in between Member States.⁴⁹ To put it as József Antall, late prime minister of Hungary did back in 1990: “There is a pressing need for guarantees agreed bilaterally, at regional and all-European levels, and the establishment of an institutional framework as soon as possible.”⁵⁰

⁴⁶ In this respect, the Romanian attempt to create a homogeneous nation state was particularly alarming.

⁴⁷ Resolution 1334 on positive experiences of autonomous regions as source of inspiration for conflict resolution in Europe.

⁴⁸ See Nick BERNARD, op. cit., p. 538.

⁴⁹ A favourable development was the formation of the European Parliament *Intergroup for Traditional National Minorities* with 42 MEPs.

⁵⁰ József ANTALL: “A szovjet katonai tömb feloszlásának javaslata (1990. június 7.)” [The Proposal to Dissolve the Soviet Military Block, 7 June, 1990] In: *Modell és Valóság II* [Model and Reality]. Budapest: Athenaeum Nyomda Rt., 1993, p. 323.

V. Dual Citizenship and the Hungarian Accession to the Union

1. The Meaning of Citizenship

The closest tie between a mother country and the parts of the nation that live beyond its borders is citizenship, and this often means dual citizenship. In the debates preceding the inconclusive referendum in Hungary on 5 December, 2004,⁵¹ various opinions were formulated on awarding Hungarian citizenship under eased conditions,⁵² i.e. without requiring permanent residence in Hungary.⁵³ This is what has commonly been dubbed “dual citizenship”. This paper discusses the issue in terms of the law of the Union and the Council of Europe Convention on Nationality.

As far as the substance of Hungarian citizenship is concerned, it should be emphasised that several rights related to citizenship depend not simply on being a citizen, but on having permanent residence and paying contributions in Hungary. An example of the former is the exercise of the right to vote, and one of the latter is access to the many social security services. Moreover, Hungarian citizenship may also offer diplomatic and consular protection abroad, and ensures that a citizen may always return home to the country. It is probably the non-substitutable security the latter entitlement involves that Hungarians living beyond the present borders of Hungary probably desire and request most. As a matter of course, Hungarian citizenship implies not only rights but duties, too. Further-

⁵¹ The following question was put to the referendum: “Do you want the National Assembly to legislate a law on offering – upon individual request – Hungarian citizenship, by preferential naturalization, to non-Hungarian citizens, living outside Hungary, declaring themselves to be of Hungarian nationality, proving their Hungarian nationality either by a ‘Hungarian Certificate’ under Article 19 of the Act 62/2001 or in another way, defined in the law requested for legislation?”

⁵² For a rich collection of data, debate and opinion, visit the homepage jointly run, and updated until the summer of 2005, by the Institute of Ethnic and National Minority Studies of the Hungarian Academy of Sciences, the László Teleki Institute and Department of International Law of Corvinus University: <http://www.kettosallampolgarsag.mtaki.hu/> [including some material in English]. For a whole book on the issue, see Árpád FASANG, *Egy népszavazás hordaléka. 2004. december 5. tanulságai* [The Debris of a Referendum: The Lessons of 5 December, 2004]. Budapest: Új Ember, 2006. The magazine *Hitel* dedicated a special issue (February, 2005) to the topic, where 40 Hungarian authors deliver their confessions and opinions on the reasons and consequences of the inconclusiveness of the referendum.

⁵³ This would have meant an amendment of Act LV of 1993 on Hungarian citizenship. The Citizenship Act was amended in 2005, but maintained the requirement of permanent residence even in the case of those non-Hungarian nationals who declare themselves Hungarian and have forbears who had been Hungarian nationals, and who can as a matter of fact be preferentially naturalised. See Article 4.3 of Act LV of 1993. Finally – after a long, agonising political debate – Act LV of 1993 was amended again in 2010, dropping the requirement of permanent residence as a precondition of Hungarian citizenship.

more, current Hungarian law provides for only one, single form of citizenship. It would contradict the prohibition of negative discrimination under Article 70 of the Constitution if Hungarian law applied other rules to those awarded citizenship under eased conditions than to other citizens. However, this does not preclude that the exercise of certain rights should be conditional on permanent residence in Hungary, and that legislation reinforce the related controls.

2. Twentieth-century Peace Treaties

Interestingly enough, the Paris Peace Treaty of 1947⁵⁴ included not one provision, not one sentence on citizenship. However, the earlier Peace Treaty of Trianon⁵⁵ has likewise no relevance with respect to granting Hungarian citizenship today. Nevertheless, awarding citizenship under eased conditions means a clear break with the spirit of the Trianon Treaty that continues to haunt even in our day, which sought to exclude dual citizenship.⁵⁶ In this respect, it is well worth quoting Article 61 of the Trianon Treaty: “All persons whose domicile (*pertinenza*) is in an area which used to belong to the territories of the Austro-Hungarian Monarchy shall be afforded, in a legally binding way and excluding Hungarian citizenship, the citizenship of the country exercising the supreme power referred to.” The rigid and exclusive association of country territory and citizenship goes back to at least this document in the Carpathian Basin, and the later – now no longer effective – conventions excluding dual citizenship also followed this pattern. It is precisely the exclusiveness of this “whose-realm-his-citizens” principle the Hungarian organisations of the neighbouring countries want to break away from in arguing for dual citizenship. The idea of “cross-border citizenship” would indeed fit in well with the terms and expressions of EU law, which has made every effort to decrease the importance of state borders for decades.

3. The Maastricht Treaty

In examining the question how far the law of the European Union affects obtaining citizenship in a Member State, we first of all have to refer to Article 17 paragraph 1 of the EC Treaty⁵⁷ establishing the European Community, which

⁵⁴ Concluded on 10 February, 1947, and ratified by Act XVIII of 1947. For its Hungarian text see, VINCENTI Gusztáv and GÁL László (eds.), *Magyar Törvénytár. 1947. évi törvény-cikkek* [The Body of Hungarian Law: Acts of 1947]. Budapest: Franklin, 1948, pp. 142-177; for a new edition, see András GERŐ (ed.), *Sorsdöntések* [Fateful Decisions], Budapest: Göncöl Kiadó, 1990, pp. 299-316.

⁵⁵ Concluded on 4 June, 1920, and ratified by Act XXXIII of 1921. For its Hungarian text see, Gyula TÉRFI (ed.), *Magyar Törvénytár. 1921. évi törvény-cikkek* [Body of Hungarian Law: Acts of 1921]. Budapest: Franklin, 1922, pp. 197-250; for its new edition, see András GERŐ, op. cit., pp. 163-253.

⁵⁶ The only way to evade losing Hungarian citizenship was by being “opted”, which could only be exercised for a limited period of time. See Articles 63-64 of the Trianon Treaty.

⁵⁷ Formerly Article 8 of the EC Treaty, now Article 20 paragraph 1 TFEU.

states: “Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship.”

As far as the personal scope of “national citizenship”, i.e. citizenship of the Member States, is concerned, the law of the European Community and the Union leaves it to the Member States to decide whom they wish to endow with citizenship and the passport it requires. This is expressly laid down by the Declaration on nationality of a Member State (no. 2) appended to the Treaty establishing the European Union. It is worth quoting the text exactly: “The Conference declares that, wherever in the Treaty establishing the European Community reference is made to nationals of the Member States, the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned. Member States may declare, for information, who are to be considered their nationals for Community purposes by way of a declaration lodged with the Presidency and may amend any such declaration when necessary.”

4. The Conditions for Hungary’s Accession to the Union

Obviously, neither the Treaty of Accession of Hungary,⁵⁸ nor any of its annexes include any provision contradicting the above; and there was of course no condition for the country’s joining the Union that the number of its citizens was not to increase. Awarding citizenship is an internal affair from the point of view of the law of the Union. Recall also that the European Union, Hungary having submitted its application for accession in 1994, sought information, through a long questionnaire about the social and economic situation, the political aspirations and the condition of the legal system in Hungary. The related document open to the public, “Hungary in the 1990s: the Answers of the Hungarian Government to the Questionnaire of the European Union”,⁵⁹ included the questions in thematic groups. Among them, we find none enquiring about the conditions of obtaining Hungarian citizenship. The answers to other questions are rather instructive however. On the issue of “cooperation with neighbouring countries”, Hungary emphasised its claim that “the movement of people... should be realised as completely as possible.”⁶⁰ It also stated with

⁵⁸ Accession Treaty of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovakia and Slovenia. *OJ L* 236, 23.09.2003. See Act XXX of 2004 ratifying the Treaty of Accession to the European Union. In: *Magyar Közlöny (Hungarian Official Journal)*, no. 60, vol. I, 30 April, 2004.

⁵⁹ Imre FORGÁCS (ed.), *Magyarország a ‘90-es évtizedben. A magyar kormány válasza az Európai Unió kérdőívére – rövidített változat* [Hungary in the 1990s: The Answers of the Hungarian Government to the Questionnaire of the European Union – abbreviated version]. Budapest: Külügyminisztérium és Integrációs Stratégiai Munkacsoport, 1997.

⁶⁰ *Ibid.*, p. 403.

regard to the theme “justice and home affairs” that it sought arrangements “that would not obstruct the Hungarian minority in the neighbouring countries in maintaining their relations with the mother country.”⁶¹ Thus the “special relationship” to be maintained with the cross-border Hungarian minority would hardly have taken the European Union by surprise.

Obviously, obtaining Hungarian citizenship does indeed have bearings on integration, because a Hungarian citizen is automatically a citizen of the Union, and can exercise all the related rights and freedoms. Thus, granting citizenship under eased conditions would mean awarding Hungarians living beyond the present borders of Hungary the opportunity of acceding, as it were individually, to the European Union, irrespective of which neighbouring state they live in. This would also entitle them to reside, work and set up business freely in any of the Member States of the Union. Moreover, they would be able to petition European Parliament. Slovakia and Slovenia acceded to the Union already in 2004, Romania in 2007, and Croatia will follow suit in a couple of years, but Serbia and the Ukraine are not likely to join in the near future. The extension of Hungarian citizenship would mean that Hungarians of the mother country “carry” other members of their nation into the European Union, restoring the historical community of fate and preventing that the borders of integration separate Hungarians living within and without the country.

5. The Jurisprudence of the European Court of Justice

The Luxembourg Court addressed the issues of citizenship among others in the *Kaur* case;⁶² this however does not pertain to Hungary and granting Hungarian citizenship. It had to do with the assessment of a declaration appended to the Accession Treaty of the United Kingdom.⁶³ In point of fact, it is a characteristic feature of the Hungarian situation that the Accession Treaty is silent about the issue of citizenship. In the lack of any provision in that treaty or any Hungarian declaration of the kind, it therefore cannot be said – as it was in the debate preceding the referendum – that “the all-time state of the rules of Hungarian citizenship was a significant basis of concluding the Accession Treaty.”

In contrast, the clarification of the issues of British citizenship was particularly justified in the case of the UK accession due to the various types of citizenship offered to those living in the British Commonwealth, such as: “Citizen of the

⁶¹ Ibid, p. 408.

⁶² Case C-192/99, *The Queen v. Secretary of State for the Home Department ex parte Manjit Kaur*, *ECR* (2001), pp. I-1237-1269.

⁶³ “Declaration by the Government of the United Kingdom of Great Britain and Northern Ireland on the definition of the term ‘nationals’ annexed to the Final Act of the Treaty concerning the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the European Communities.” See the ruling in the *Kaur* case, *ECR* (2001), p. I-1269.

United Kingdom and Colonies” or “British Overseas Citizen”. These citizens, who were endowed with limited rights, in all probability outnumbered the total population of the European Communities at the time, and the scope of their rights, with special regard to the free movement of persons, was not in the least indifferent to the Common Market. (The *Kaur* case mentioned above evidenced this very specific social background, dealing with the residential rights of a Kenyan citizen in the United Kingdom and the Union.) The European Court, however, even in this case, simply referred the matter back to the declaration the UK made as a Member State, and essentially declined from having the law of the Union make a determination on the issue.⁶⁴

However unequivocal, this legal situation does not preclude the possibility that a neighbouring Union Member State should take Hungary to the European Court on the basis of Article 259 TFEU, stating that it “has failed to fulfil an obligation under the Treaties.”⁶⁵ Such a lawsuit is not very likely, however, not only because of the counter arguments based on substantive law, but because the case would first have to be referred to the Commission for its views, and, furthermore, the procedure is seldom employed.

6. Recent Development of Law

As far as the recent development of law is concerned, we would be justified in citing Article I-10 (2) of the Treaty establishing a Constitution for Europe, essentially repeating Article 17 (8) of the EC Treaty quoted above, which states that Union citizenship shall not replace “national” citizenship. The declarations appended to the Constitution did not include Declaration 2 we referred to above, which explicitly relegates the definition of citizenship to the Member States. But there is no need to repeat the declaration because the last sentence in Article IV-438 (3) was specifically meant to preserve the legal effect of the declarations the Member States had made earlier, though the Constitution was meant to repeal all former founding treaties and their amendments.⁶⁶ That this

⁶⁴ “In order to determine whether a person is a national of the United Kingdom of Great Britain and Northern Ireland for the purposes of Community law, it is necessary to refer to the 1982 Declaration by the Government of the United Kingdom of Great Britain and Northern Ireland on the definition of the term ‘nationals’ which replaced the 1972 Declaration by the Government of the United Kingdom of Great Britain and Northern Ireland on the definition of the term ‘nationals’, annexed to the Final Act of the Treaty concerning the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the European Communities.” Ibid. In Declaration 63. annexed to the Lisbon Treaty the United Kingdom reiterated its Declaration made on 31 December 1982.

⁶⁵ Former Article 227 (1) of the EC Treaty.

⁶⁶ So reads Article IV-438 (3): “The acts of the institutions, bodies, offices and agencies adopted on the basis of the treaties and acts repealed by Article IV-437 shall remain in force. Their legal effects shall be preserved until those acts are repealed, annulled or amended in the implementa-

power of the Member States would continue to exist is clearly marked by the declaration on the definition of “nationals” the United Kingdom appended to the Constitutional Treaty and later to the Treaty of Lisbon, renewing its former declaration thereof.⁶⁷ Finally Article 20 TFEU confirms again that “citizenship of the Union shall be additional to and not replace national citizenship”

7. The Convention on Nationality of 1997

The Convention on Nationality of the Council of Europe⁶⁸ requires special assessment when regarding the granting of citizenship to those belonging to the Hungarian nation but without permanent residence in Hungary. The Convention recognises that “Each State shall determine under its own law who are its nationals.” However, it also lays down the prohibition of discrimination, stating: “The rules of a State Party on nationality [i.e. to this Convention] shall not contain distinctions or include any practice which amount to discrimination on the grounds of sex, religion, race, colour or national or ethnic origin.”⁶⁹

In a statement on granting Hungarian citizenship under eased conditions issued on 1 December, 2003, the President of the Republic of Hungary asserted that the annulment of the requirement of permanent residence would accord with international law and the prohibition of discrimination in Article 5 of the European Convention on Nationality in particular. The statement formulated this possibility for those non-Hungarian nationals, many of whose forebears had been Hungarian citizens. Such persons could have been awarded preferential naturalization even under Article 4 (3) of Citizenship Act effective then. According to the expert consultations preceding the presidential statement, privi-

tion of this Treaty. The same shall apply to agreements concluded between Member States on the basis of the treaties and acts repealed by Article IV-437. The other components of the *acquis* of the Community and of the Union existing at the time of the entry into force of this Treaty, in particular the interinstitutional agreements, decisions and agreements arrived at by the Representatives of the Governments of the Member States, meeting within the Council, the agreements concluded by the Member States on the functioning of the Union or of the Community or linked to action by the Union or by the Community, *the declarations, including those made in the context of intergovernmental conferences, as well as the resolutions or other positions adopted by the European Council or the Council and those relating to the Union or to the Community adopted by common accord by the Member States, shall also be preserved until they have been deleted or amended*” (italics added).

⁶⁷ See Annex 46 of the Treaty establishing a Constitution for Europe.

⁶⁸ Ratified by Hungary in Act III of 13 February, 2002.

⁶⁹ For a detailed discussion of the Convention, see Péter KOVÁCS, “A kettős állampolgárság kérdése az Európa Tanács nemzetközi szerződéseinek koordinátái között” [The Question of Dual Citizenship in the Coordinates of the International Agreements of the Council of Europe], Manuscript based on a workshop lecture delivered at the Hungarian Academy of Sciences on 10 March, 2004.

leging this group of persons would not infringe international law because, as the Council of Europe had emphasised in an interpretative report on the Convention, it is permitted practice for states to stipulate conditions for granting citizenship, which might be preferential treatment of certain persons under given circumstances. Generally accepted and lawful conditions of preferential naturalisation include the knowledge of the language of the country, descent and place of birth.⁷⁰

8. The Report of the Venice Commission

Essentially, this view was confirmed by the report of the European Commission for Democracy through Law (Venice Commission) “Preferential Treatment of National Minorities by Their Kin-State”⁷¹ upheld, which *mutatis mutandis* can also be invoked now: “As regards the basis for the difference in treatment under the laws and regulations in question, in the Commission’s opinion the circumstance that part of the population is given a less favourable treatment on the basis of their not belonging to a specific ethnic group is not, of itself, discriminatory, nor contrary to the principles of international law. Indeed, the ethnic targeting is commonly done, for example, in laws on citizenship.”⁷² Finally, we must also mention Resolution 770/H/2003 of the Hungarian Constitutional Court, which, on the basis of interpreting the Convention on Nationality and on the example of several European countries, concluded that all cases of preferential treatment by states when granting citizenship cannot be deemed to infringe Article 5 of the Convention.⁷³ However, a regulation based on a general concept of nation, which is more elusive than one relying on descent and not sufficiently defined, would be far more disquieting, not to mention that “the Convention contains many provisions designed to prevent an arbitrary exercise of powers which may also result in discrimination.”⁷⁴

⁷⁰ Point 40 of the Explanatory Report says: “Common examples of justified grounds for the differentiation of preferential treatment are the requirement of knowledge of national language in order to be naturalised and the facilitated acquisition of nationality due to descent or place of birth.” This was practically what the expert material of the Foreign Ministry submitted to the Citizenship Committee of the Hungarian Permanent Conference (MÁÉRT), manuscript, 2004.

⁷¹ Approved of by the 4th Plenary of the Venice Commission (19-20 October, 2001), see [http://www.venice.coe.int/docs/2001/CDL-INF\(2001\)019-e.html](http://www.venice.coe.int/docs/2001/CDL-INF(2001)019-e.html).

⁷² See page 23 of the document.

⁷³ See point III/3 of the Resolution.

⁷⁴ See Péter KOVÁCS, op. cit., referring to pages 7-8 of the Interpretive Report on the Convention on Nationality.

VI. On the Hungarian Status Act in Terms of the Law of the European Union⁷⁵

1. Invoking the Law of the Union

In justifying the 2003 amendment of the Hungarian Status Act,⁷⁶ references frequently have been made to the accession to the European Union and the law of the Union (the Community), but often hastily or based on unguarded foreign opinion. The law of the European Union requires thorough analysis, and tagline references ought to be avoided. All the more so because legislation amounting to tens of thousands of pages necessarily has several strains and carries complex messages – it would be rash to pick up one thread without paying heed to the whole texture of European law. Furthermore, apart from the most important issues, the various conditions of Hungarian accession should also not be left out of consideration.

2. The Treaty of Accession

Sticking to the accession itself, it should immediately be noted that neither does the Treaty nor do its Protocol and Annexes mention the Status Act, and none provide for its amendment. Hungary undertook no such obligation. Perfectly aware of the then-effective Status Act, the European Commission made its proposal on accepting Hungary's application to Union membership, and the European Union supported the accession in this knowledge. We are justified in assuming that had the Commission had any qualms about the issue, it would certainly have initiated consultations with Hungary that had become a Member State in the meantime, and that, assuming a worst-case scenario, it could even have brought an action against it before the European Court of Justice.⁷⁷ After all, it is up to the European Court to decide on the final and authentic interpretation of the law of the Union.⁷⁸ The Member States of the European Union and enterprises working in them have often taken the risk of being judged by the European Court in matters far less in significance – in order, for instance, to protect their national or business interests, like the Italians did to protect the name *pasta*⁷⁹ or the packaging of *Prosciutto di Parma*.⁸⁰

⁷⁵ For a comprehensive review of the issue, but with emphases differing from this chapter, see Frank HOFFMEISTER, *op. cit.*, pp. 96-100.

⁷⁶ Act LXII of 2001 on Hungarians living in neighbouring countries, and Act LVII of 2003 amending Act LXII of 2001.

⁷⁷ As provided for by Article 226 of the EC, now Article 258 TFEU.

⁷⁸ See, among others, Articles 220, 226 and 234 of the EC Treaty, now Article 19 TEU and Articles 258, 267 TFEU.

⁷⁹ See case 407/85, *Drei Glocken v. USL Centro Sud*, *ECR* (1988), p. 4233.

3. The Charge of Discrimination on Grounds of Nationality

As is well known, the Hungarian government chose another way, another tactics. It voluntarily drafted a comprehensive amendment of the Status Act to modify its very structure, and requested the opinion of the competent Commissioner of the European Commission. This was how Günter Verheugen, late Commissioner for Enlargement, came to write his now well-known letter to the incumbent Hungarian Prime-Minister and its summary annex.⁸¹ As far as substance is concerned, the most serious charge levelled against the act was discrimination on grounds of nationality and ethnic origin. It is of course fact that the law of the Union prohibits discrimination on grounds of nationality. But does the notorious Article 12 (6) of the EC Treaty, now Article 18 TFEU apply to the original version of the Status Act? Could Hungary have been found fault with on this count? In all probability, it could not. The prohibition of negative discrimination on grounds of nationality had been formulated and modelled on the basis of a life situation all too different. That situation was where a worker, a tourist or an entrepreneur from one Member State went to another, and found him- or herself at a disadvantage compared to citizens of the Member State; where a German worker had to meet stricter conditions for employment in France than his French colleagues only because he was not a French citizen, which genuinely breached the principle of free employment and enterprise in the single European market.

4. A New Direction in Minority Protection

This was not the case with the Status Act. It meant a new direction in minority protection: support for some two million Hungarians living beyond the present borders of Hungary in the spirit of the protection of national identity, self-respect and culture. It was an act of solidarity, care, assistance for the weaker members of the nation. Moreover, not a single citizen of the European Union would have been discriminated against as compared to Hungarians under the Status Act; neither internal equality before the law nor the free movement of persons as protected by Union law would have been infringed.

⁸⁰ See case C-108/01, *Consorzio del Prosciutto di Parma and Salumificio S. Rita SpA v. Asda Stores Ltd and Hygrade Foods Ltd*. *ECR* (2003), p. I-5121.

⁸¹ “Assessment of the compatibility of the revised draft ‘Law on Hungarians living in neighbouring States’ with European standards and with the norms and principles of international law (findings of the Council of Europe’s Venice Commission) and with the EU law.” The opinion expressed concern that the law would create a political link, and have an extra-territorial and discriminative effect.

However, as a result of the Union-level recognition of advantageous or positive discrimination on grounds of ethnic origin,⁸² the concept of discrimination on grounds of nationality might also need to be reconsidered. It would be reasonable to take a more sophisticated and moderate stance in so far as support for national minorities would be exempted from charges of discrimination on grounds of citizenship. This is all the more true as several Member States of the European Union support members of their nations who live beyond their borders through arrangements comparable to the Hungarian Status Act. Suffice it to refer to the Romanian, Slovak, Austrian, Italian, or Greek examples.⁸³ It is a telling fact that the European Commission has never called into doubt the legality and justifiability of these laws and practices. No action has ever been brought before the European Court of Justice because of the support given to Greek or Italian minorities living outside their mother country. No doubt, Hungary would have also been saved from such an ordeal.⁸⁴ Moreover, it is a contradiction in terms to expect to pass a benefit law without legal right to real benefits. As the Hungarian President put it at a meeting of the Hungarian Permanent Conference in 2003: “a Status Act without positive discrimination... amounts to squaring a circle.”⁸⁵

⁸² See Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. *OJ L 180*, 19.7.2000, pp. 22-26.

⁸³ The László Teleki Institute for Central-East European Studies published several volumes on the Status Act, such as Zoltán KÁNTOR (ed.), *A státustörvény. Dokumentumok, tanulmányok publicisztika* [The Status Act. Documents, Studies]. Budapest: Teleki László Alapítvány, 2002 [Zoltán Kántor, 2002a]; idem, 2002b. For the texts of the Romanian, Slovak and Slovenian laws, see the Dual Citizenship homepage of the Institute of Ethnic and National Minority Studies of the Hungarian Academy of Sciences, the László Teleki Institute and Department of International Law of Corvinus University: <http://www.kettosallampolgarsag.mtaki.hu/> (updated until the summer of 2005).

⁸⁴ Frank Hoffmeister takes a positive view of the pressure exerted by the European Commission on the issue of the Hungarian Status Act, regarding it as a means of solving tensions between candidate countries: “In conclusion, this example demonstrates that informal mediation by the European Commission played a significant role in a highly complex issue of minority protection, involving deep differences in the historical perceptions of the future member states. ...the EU exercised the decisive leverage on the countries concerned to strive for compromise, when the European Commission puts its political weight behind the Council of Europe expert advice” op. cit., p. 100. However, Hoffmeister addressed the issue in terms of neither history nor Community law. That the mediation he so much welcomed proved to bring about a mere pseudo-solution was clearly demonstrated by the elemental upsurge of the demand for Hungarian citizenship among cross-border Hungarians following the debilitation of the Status Act. Characteristically, the European Commission never exerted as much of its influence against an openly discriminative, right-depriving act, one still in effect though not applied – the Beneš Decrees, as it did for the amendment of the Status Act.

⁸⁵ See the homepage of the Office the President of the Republic of Hungary: <http://www.keh.hu> (17 June, 2003)

5. Conclusion

Accession to European integration and its law does not imply that the interests of nations and national minorities have vanished or dissolved in a pan-European melting pot; it only means that the fora, the means and references of enforcing interests have been partly changed. Further, the European Union has only a very limited means of promoting minority protection at its disposal, but it has also often lacked the understanding to recognise the significance of the issue. In elaborating the means of minority protection within the European Union, the principle of proportionality and the virtue of moderation should be maintained, since two competing concerns need to be reconciled. On the one hand, European integration should provide more serious protection to national minorities than it has done to date; on the other hand, in keeping with the principle of subsidiarity, with the respect for the particular and the local, no central “European” solutions should be hoped for: the level of Member States is going to be ineluctable in this area.